Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SSC CORP.,

Petitioner,

vs.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below misapply this Court decision in *C. & A. Carbone v. Town of Clarkstown*, --- U.S. —, 114 S.Ct. 1677 (1994) by holding that a town may restrict the interstate movement of solid waste and evade the holding in *Carbone*, simply by prohibiting any company from providing residential solid waste collection services in the town, unless such company first signs a contract with the town, agreeing to dispose of residential solid waste at an in-state facility designated by the town, a provision which could not be imposed directly by law under the *Carbone* decision.

2. Did the Court below misapply the Market Participant doctrine when it accorded market participant status to a local government that had not directly entered the market for refuse collection or disposal services as a buyer, seller or employer, but which had instead contracted for these services from private parties whom it was also actively regulating?

3. Since the Market Participant doctrine has never been applied in cases involving natural resources, and since Congress has declared the energy and material content in solid waste to be a natural resource, was it improper for the Court below to apply the Market Participant doctrine to such a natural resource?

4. Does the ruling below commit error, by allowing a market regulator to restrict the interstate movement of solid waste; and if the ruling below is correct, does it threaten to cripple emerging national markets for energy and material resources extracted from solid waste?

LIST OF PARTIES

The parties are those set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner SSC Corp. prays that a writ of certiorari issue to review the judgment and order of the Second Circuit Court of Appeals.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is reported at 66 F.3d 502 (2d Cir. 1995) and is reproduced in Appendix A at 1a *et seq.* The order of the District Court is unreported and is contained in Appendix B at 36a *et seq.*

STATEMENT OF JURISDICTION

The decision of the Court of Appeals invalidating one part of the Smithtown ordinance on Commerce Clause grounds but upholding the "improvement contract" issued pursuant to that ordinance was rendered on September 19, 1995 (Appendix A at 1a-35a).

This Court's jurisdiction to review this case upon certiorari is conferred by 28 U.S.C. § 1254, since the Court of Appeals upheld, in a final judgment, a local town ordinance and certain provisions of a contract issued under that ordinance against a challenge under the dormant Commerce Clause of the Constitution, Art. I, Sect. 8. cl. 3. Federal jurisdiction was originally invoked in the district court under 42 U.S.C. §1983.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

SMITHTOWN CODE § 177-17(B) (1994):

> No person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of

> acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section.

SMITHTOWN CODE § 177-4 (1994).

> Only solid waste acceptable at specific town-designated facilities, including but not limited to garbage, trash, rubbish, refuse, construction and demolition materials and yard waste that are normally disposed of by and collected from residential, commercial, industrial, governmental, community facilities or institutional establishments, except that "acceptable wastes" shall not include unacceptable waste and recyclables.

U.S. CONSTITUTION, ARTICLE I, SECT. 8, CL. 3:

> Congress shall have Power . . .
>
> To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

Preliminary Statement

This case involves an important application of this Court's recent decision in *C. & A. Carbone v. Town of Clarkstown*, --- U.S. ---, 114 S.Ct. 1677 (1994). That decision prohibited governmental units from enacting "flow control" laws that required solid waste (a natural resource that might otherwise be taken to another jurisdiction) to be directed to a specific processing facility whose "tipping fees" benefitted the government that passed the law in question. While the Court of Appeals below paid lip service to the *Carbone* decision and struck down a local law (enacted by Smithtown,

N.Y.) that mirrored the law condemned in *Carbone*, it allowed Smithtown to evade the requirements of *Carbone* by simply requiring any solid waste collector to enter into a contract with the Town and to agree to conditions specifically prohibited by this Court in *Carbone*.

The Court below arrived at this strange result -- which allowed towns in Smithtown's position to do indirectly (through a contract provision) what they could not do directly (by enacting a prohibited ordinance) -- through a misreading and misapplication of this Court's market participant doctrine. Review is necessary to correct this serious error in Commerce Clause analysis. Review is also necessary because there is a conflict between the circuits concerning the application of the market participant doctrine to provisions in a municipal solid waste collection contract, which prohibit the interstate disposal of solid waste.[1]

The lower court misapplied the market participant doctrine in two respects. First, it accorded market participant status to a local government that had established an exclusive monopoly with respect to the market at issue, namely solid waste collection and disposal services. Thus its demand for bids from private collectors for the privilege of collecting waste and its letting of contracts to them was part of a regulation process dealing with the collection and disposal of garbage generally. The letting of collection and disposal

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[1] As the Court below stated, petitioner "directs our attention to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566, 1570, 1575-77 (M.D. Ala. 1993) *aff'd sub nom. United States v. Bankster*, 23 F.3d 41 (11th Cir. 1994), where the court rejected application of the market participant doctrine to a garbage collection and disposal contract much like the one between Smithtown and SSC . . . We decline to adopt the reasoning of the *Waste Recycling* court." See 29a.

contracts did not constitute the town's participation in a discrete local market, which private parties could enter or leave at will, on the same basis as the Town did.

Second, the Court of Appeals failed to recognize that this Court has set limits on the market participant doctrine, which bars the application of that doctrine in this case.

The market participant doctrine has been applied by this Court only in instances where a state directly acts as a buyer or seller of goods, or as an employer, and it effects the market only through the laws of supply and demand. *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983). No such conduct is evident in the record below.

The market participant doctrine, moreover, has no application in cases involving a natural resource. This fact is significant, since in *Carbone, supra*, this Court clearly considered solid waste to be a natural resource. It declined to apply the market participant doctrine in that case, and struck down a flow control law that "hoarded a local resource[.]" *Id.* 114 S. Ct. 1682, 1683.[2] Finally, even

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[2] An important exception to the market participant doctrine exists where the state is dealing with a natural resource. *Reeves v. Stake*, 447 U.S. 429, at 443-44. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §6901 *et seq.*, the principal federal statute regulating the management of solid waste, codifies solid waste as a natural resource, finding at 42 U.S.C.A. §6901(c) and §6901(d), that energy and raw material in solid waste, "can reduce the dependence of the United States on foreign resources" and that "solid waste represents a potential source of solid fuel, oil or gas that can be converted into energy." The 11th Circuit echoed this reasoning in *GSW, Inc. v. Long County*, 999 F.2d 1508 (11 Cir. 1993), holding that "[w]aste disposal

if a town is entitled to market participant status, the decision in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), holds that the local government may not regulate conduct in a "downstream market." Yet this is precisely what the Town contractual flow control provision does, when it prohibits out-of-state disposal facilities from marketing their services in interstate commerce.

The decision below seriously erodes the protections of the Commerce Clause, and promotes the type of economic balkanization the Commerce Clause was intended to prevent.[3] It is respectfully submitted that the court below applied the market participant doctrine in a manner that does a grave injustice to the prior rulings of this Court.

Statement of Facts

This case arose when Respondent Town of Smithtown (the Town) threatened to sue Petitioner, SSC Corp., for more than $1,000,000.00 based on alleged violations of a "flow control" provision in a residential refuse collection contract (the Contract) between the Town and SSC. Based on these alleged breaches of

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service is more comparable to a natural resource[.]" *Id.*, at 1516.

[3] See e.g., concurring opinion of Justice O'Connor in *Carbone:*

> Over 20 states have enacted statutes authorizing flow control laws. If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent. 114 S.Ct. at 1690.

contract, as Well as alleged violations of the Town's flow control ordinance, the Town unilaterally withheld $761,111.46 in payments due SSC Corp. under the Contract. SSC Corp. has repeatedly denied violating the flow control provisions of the contract or the ordinance.

Since the withholding of funds by the Town exposed SSC Corp. to financial ruin, and since the alleged violations of the Town's flow control ordinance exposed the company to significant civil and criminal penalties, SSC took action in federal court seeking a declaration under 42 U.S.C. § 1983, that the flow control provisions in the Contract, and in the Smithtown Town Code, constituted *per se* violations of the Commerce Clause. The district court agreed, and granted summary judgment in favor of SSC Corp.[4] (36a *et seq.*)

The Town appealed to the Second Circuit, and on September 19, 1995, the Circuit Court entered judgment affirming in part, and reversing in part, the judgment of the district court. The Second Circuit agreed with the district court, finding that the Town's flow control ordinance violated the Commerce Clause. "Carbone compels us to find that Smithtown flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in state and out-of-state competitors." (26a). But the court also disagreed with the district court, holding that because the Town was a "market participant," it could enforce a contractual flow control provision that it could not have enforced in the form of an ordinance.

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[4] Section 177-102 of the Smithtown Town Code, which was invalidated by both the District and Circuit Court, provided that any person violating the Town's flow control law "shall be guilty of an unclassified misdemeanor and shall be liable to a fine of not more than five thousand dollars ($5,000.) or imprisonment for not more than sixty (60) days, or both."

Contractual Flow Control In the Town of Smithtown

The Contract authorizes SSC Corp. to provide solid waste collection services in seven of ten residential refuse collection districts created and administered by the Town.[5]

Under the Contract, the Town reserved the right to designate sites for the disposal of solid waste collected by SSC Corp. Section 1.04 A.1 of the Contract thus provides that: "All residential solid waste collected by the Contractor shall be transported to and disposed of at solid waste management facilities which are or may be designated by the Town of Smithtown during the term of this Contract." The Contract designates a privately-owned incinerator in the neighboring township of Huntington (New York), as the exclusive instate disposal site for refuse collected under the Contract.

The contractual flow control scheme advanced by the Town is feasible only because the Town dominates the local market for residential refuse collection service. No private company may provide refuse collection service in the Town, without first obtaining a permit from the Town; and no company may successfully bid on a residential refuse collection contract, unless it agrees to be bound by the contractual flow control provisions mandated by the Town. No private party could control a market so completely.

Impact on Interstate Commerce

The parties have stipulated that SSC Corp. has available to it out-of-state landfills which accept solid

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[5] Refuse collection districts are authorized under Article 12 and 12a of the New York State Town Law. These districts may contract for solid waste collection services that benefit persons and property within the district, and may impose and collect *ad valorem* tax assessments to recoup the cost of operating and maintaining the district.

waste for disposal at rates which are lower than the $65.00 per ton tipping fee imposed by the privately owned local incinerator favored by the Town in the Contract. The parties have further stipulated, that the flow control provisions in the Contract, prevent SSC Corp. from disposing of locally generated, residential solid waste outside the State of New York.

The record below also establishes that in 1992, nearly four million tons of solid waste generated in New York State, were shipped out-of-state for disposal, to states including Massachusetts, Connecticut, Pennsylvania, Ohio, Georgia, Arkansas, Illinois, Indiana, Kentucky, N. Carolina,, West Virginia, Virginia, Texas and Colorado.[6] On the national level, the record documents that 19 million tons of solid waste moved in interstate commerce during 1992, representing approximately 9% of the estimated 200.6 million tons of solid waste generated in the United States that year. These statistics confirm the holdings in *C & A Carbone v. Town of Clarkstown*, -- U.S.--, 114 S.Ct. 1677 (1994) and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which recognize that solid waste is an article of commerce, fully deserving of protection under the Commerce Clause.

The Decisions Below

The district court granted summary judgment to petitioner from the bench, and entered a Judgement and Order which appears as Appendix B (36a *et seq*). On appeal, the Second Circuit came to the astonishing conclusion that the Town's flow control ordinance was unlawful under *Carbone*, but that the Town's contractual

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[6] In 1994, over 4,119,448 tons of solid waste were exported for disposal from New York State, an increase of 211,913 tons, or 5.4% over the 3,907.535 tone exported during 1993. *Where Will the Garbage Go 1995*, Report of the New York State Assembly Legislative Commission on Solid Waste Management (April 1995), page 19.

flow control program was lawful, because the Town was acting as a market participant. The decision of the Second Circuit appears as Appendix A (1a-35a).

The decision below relied heavily on the holding in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). In *White*, the Supreme Court held that the City of Boston did not violate the Commerce Clause when it imposed local hiring requirements in city-funded construction contracts. The *White* Court reasoned that since the city had effectively entered the market as an employer ("[everyone affected by the order is, in a substantial if informal sense, "working for the city." *id*, 460 U.S. at 211, the City was could act like any private merchant, to impose contractual provisions which burdened interstate commerce. The Second Circuit thus held that "if Boston could require contractors for city-funded projects to hire a certain percentage of city residents . . . Smithtown can require SSC to use local incinerating services as well." 27a. The Second Circuit then reversed that portion of the district court decision which found contractual flow control by the Town to be violative of the dormant Commerce Clause.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PERMITS AN OBVIOUS SUBTERFUGE TO AVOID THIS COURT'S HOLDING IN *CARBONE* AND MUST BE REVERSED

This Court established an important principle in *Carbone* with respect to the hoarding of solid waste resources by a local government. In *Carbone*, this Court struck down a local solid waste flow control law as a *per se* violation of the Commerce Clause. "We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving the municipality", *Id.*, 114 S. Ct. at 1680. Writing for the majority, Justice Kennedy concluded that

because the ordinance attains its goal "by depriving competitors, including out-of-state firms, of access to a local market, we hold that the flow control ordinance violates the Commerce Clause." *Id.* This Court reached this decision, while acknowledging that "state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment." *Id.*, at 1680.

The essential vice of flow control is that it drives up the cost of solid waste disposal by denying out-of-state landfills access to local markets. As Justice Kennedy explained:

> By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste. Furthermore, even as to waste originating in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause.

114 S.Ct. at 1681.

Justice Kennedy continued:

> With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. . . . The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state [companies] are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource--be it

> meat, shrimp, or milk--for the benefit of local businesses that treat it. The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.

114 S.Ct. at 1682-3.

The Second Circuit properly held that one aspect of the Smithtown ordinance which enforces the flow control requirements though threat of criminal sanctions, was barred by *Carbone*. But it immediately undermined that holding by deciding that the Town could achieve the same result by imposing a contract provision on any waste collector which provision would achieve the same effect -- namely the hoarding of "solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." The decision below allows every vice condemned by the *Carbone* decision, the import of of-of-state processing service is barred; "out-of-state [companies] are deprived of access to local demand for their services;" and a local resource is hoarded "for the benefit of local businesses that treat it."

This Court has never allowed its decisions to be so casually disregarded by such an obvious device, in particular through the imposition of contractual provisions that would violate the Constitution if imposed directly by law or ordinance. This rule rests upon the doctrine of "unconstitutional conditions," see *e.g. Perry v. Sindermann*, 408 U.S. 593 (1972)(unconstitutional restriction on First Amendment rights cannot be imposed as a condition of public employment).

See also *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994):

> Under the well-settled doctrine of unconstitutional conditions, the government may not require a person to give up a constitutional right -- here the right to receive just

> compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann*, 408 U.S. 593 ... (1972), *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568, ...(1968).

The Town of Smithtown imposed an improper and unconstitutional condition on companies bidding on waste collection and disposal services in the Town -- namely the right to seek out cheaper out-of-state processors.[7] This Court prohibited such requirements directly and must also establish any indirect impositions of such requirements, through contracts such as that involved in the instant case.

II.

THE COURT SHOULD DECIDE WHETHER THE MARKET PARTICIPANT DOCTRINE WAS MISAPPLIED BY THE LOWER COURT, WHEN IT ACCORDED MARKET PARTICIPANT STATUS TO A LOCAL GOVERNMENT THAT WAS ACTING AS A MARKET REGULATOR

A. The Market Participant Doctrine

This Court has developed an exception to the broad reach of the Commerce Clause to address situations where a state is directly acting as a participant in the market, rather than as a regulator. *Hughes v.*

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[7] There are some conditions that a Town might establish that would be rationally related to the object of the disposal contract. For example, if a Town required that solid waste must be disposed of only at licensed facilities. However, when the disposal requirements specifies that only in-state facilities qualify as a disposal site (thereby excluding even licensed out-of-state facilities from consideration, the Commerce Clause is offended.

Alexandria Scrap, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). This exception is known as the market participant doctrine.

Two reasons underlie the market-participant doctrine. First, there is "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *White v. Massachusetts Council*, 460 U.S. at 207 n. 3, quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). "Evenhandedness suggests that, when acting as proprietors, States should . . . share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Reeves, Inc. v. Stake*, 447 U.S. at 439 (citations omitted). Second, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Id.* at 436-37 (citation omitted). "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.*

In deciding cases which assert "market participation" as a basis for Commerce Clause immunity, the critical question for the Court is whether the challenged governmental conduct is more analogous to the business activities of traders and manufacturers, in which case the local government should be allowed to pursue its own economic interest and determine those with whom it will deal in the private market -- or is more analogous to an effort to regulate activities among such parties in the private market -- in which case the local government must be subject to Commerce Clause scrutiny. It is respectfully submitted, that the Court below misapplied this standard.

B. The Town As Market Regulator

New York law makes clear that a town is fulfilling a governmental duty when it provides garbage collection or disposal services. *USA Recycling, Inc. v. Town of Babylon*, 64 USLW 2186, 1995 WL 553843 (2nd Cir. N.Y., September 19, 1995). New York municipalities have a duty to ensure proper collection and disposal of trash for the well-being and health of the community. *Nehbras v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95, 159 N.Y.S.2d 145, 140 N.E.2d 241 (1957); 1979 N.Y.Op.Att'y Gen. (Informal) 237 ("Generally, the removal of garbage is an affirmative duty properly delegated to and imposed upon municipalities.").

To fulfill this duty, a municipality may perform the function of removal directly through its own department; or it may have it performed under a public contract; or it may require a license to be obtained by persons or firms authorized and qualified to perform that function. It is for the municipality, within reasonable bounds, to determine how solid waste will be collected and removed, or rendered harmless. *P. & A. Carting Co. v. City of New York*, 7 Misc.2d 815, 817, 158 N.Y.S.2d 296 (Sup.Ct., Special Term, N.Y.County 1956). This responsibility is carried out through regulation.

In this case, Smithtown performs its regulatory duty with respect to solid waste management, through: (a) a permit program that prohibits private parties from offering refuse collection services, without prior approval from the Town, in the form of a permit; (b) by creating and administering a town wide system of residential refuse collection districts, which provide that only one contractor may provide service to a given district; (c) by establishing civil and criminal penalties for haulers who collect garbage without a license; and most importantly, (d) by dictating that no private party may bid on a residential refuse collection contract unless it agrees to the terms mandated by the Town.

These are indications of market regulation, not market participation, since no private actor could control a market so completely. The Court below was therefore in error when it determined that the Town was a market participant and exempt from scrutiny under the Commerce Clause.[8]

III.

THIS COURT HAS SET LIMITS ON THE APPLICATION OF THE MARKET PARTICIPANT DOCTRINE, WHICH LIMIT ITS APPLICATION IN THIS CASE, AND WHICH RENDER THE DECISION BY THE SECOND CIRCUIT IMPROPER AND CONTRARY TO LAW.

A. Limits on the Market Participant Doctrine

This Court has limited the market participant doctrine to cases where the state acts directly as a buyer of goods (*Hughes v. Alexander Scrap*, 426 U.S. 794 (1976)), a seller of goods (*Reeves v. Stake*, 447 U.S. 429 (1980)) of goods, or as an employer (*White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1984)). The doctrine has never been applied to a case such as this one, where the state did not directly enter the market as a buyer, seller or employer.

The Supreme Court first articulated the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*

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[8] Petitioner does not question the central role of local government in the regulation of solid waste. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). It merely asserts that this Court has never suggested that local government may perform its traditional oversight function without regard to the Commerce Clause.

426 U.S. 794 (1976), which involved Maryland's statutory program to pay bounties for the destruction of abandoned vehicles titled in Maryland. A Commerce Clause dispute arose because out-of-state scrap processors were required to provide more extensive documentation to show that they were entitled to the bounty.

The effect of the Maryland statute was to offer a subsidy only to scrap processors located within the State. See 426 U.S., at 803, n. 13. The Court held that a State, free from Commerce Clause scrutiny, may enter "the market as a purchaser, in effect, of a potential article of interstate commerce" and "restric[t] its trade to its own citizens or businesses within the State." Id., at 808, 96 S.Ct., at 2497. *Alexandria Scrap* allows a State to avoid Commerce Clause scrutiny when it directly acts as a buyer of goods. Id. at 806, 96 S.Ct. at 2496.

The Court next applied the market participant doctrine in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), a case challenging South Dakota's practice of limiting the sale of cement produced at a state-owned plant to state residents in times of shortage. The Court reaffirmed its holding in *Hughes, supra*., explaining that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S. at 437, 100 S.Ct. at 2277. In *Reeves*, South Dakota refused to sell cement to out-of-state consumers until the orders of all in-state customers were filled. The Court held that the Commerce Clause is not implicated when a State prefers its own residents when it acts as a seller of state-produced goods. But there was no indication that the State had first established a monopoly in the manufacture of cement before it imposed its restrictions on to whom it would sell.

In 1983, the Court extended the market participant doctrine in *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983), to permit a city to require that at least half of the workforce used to

complete city-funded construction projects must be comprised of city residents. Id. at 208-09, 103 S.Ct. at 1045. The fact that the city was in a substantial if informal sense directly acting as an employer, id., n.7, was "crucial" to the market-participant analysis in *White. United Building and Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). But once again the City did not establish any type of monopoly in construction services before it imposed its condition on whom it would employ. Construction companies were still free to bid on other construction projects and to hire out-of-state laborers to work on those projects.

Here by contrast, the Town of Smithtown first declared its total control -- a monopoly -- over residential solid waste collection and disposal services. No other company could compete in that market without dealing and contracting with the Town. And the conditions established by those contracts would be illegal if imposed directly by law.

This Court has limited the market participant doctrine only to instances where a state acts directly as a buyer or seller of goods, or as an employer. Contrary to the decision below, the market participant doctrine has never been applied where as here, the state is merely a consumer of services which are performed by an independent private party.[9]

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[9] Indeed, if the consumption of services directly performed by private parties entitled a municipality to market participant status, a town could claim to be a market participant in the legal services market by hiring outside counsel; or, a town could claim to be a market participant in telecommunications, by relying on the services of the local private telephone company. Because these results would be absurd, it is clear that the market participant doctrine has no application when a municipality relies on the private sector to perform public services.

B. The Market Participant Doctrine Does Not Apply to Natural Resources

An important exception to the market participant doctrine exists where the state is dealing with a natural resource. *Reeves v. Stake*, 447 U.S. 429, at 443-44. A state is not permitted to hoard a natural resource within its borders for the benefit of its citizens. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (striking down West Virginia statute giving preference to domestic consumers of natural gas over out-of-state users); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911) (prohibiting Oklahoma from barring out-of-state transportation of natural gas). Solid waste qualifies as a natural resource, because of its energy and material content.

This fact was recognized by the United States Congress when it enacted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §6901 *et seq.*, the principal federal statute regulating the management of solid waste. RCRA recognizes solid waste as a natural resource, at 42 U.S.C.A. §6901(c) and §6901(d), which provides:

> (c) **Materials**
>
> The Congress finds with respect to materials, that --
>
> (1) millions of tons of recoverable material which could be used are needlessly buried each year;
>
> (2) methods are available to separate usable materials from solid waste; and
>
> (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.
>
> (d) **Energy**
>
> The Congress finds with respect to energy, that --

> (1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;
>
> (2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and
>
> (3) technology exists to produce usable energy from solid waste."

As RCRA suggests, there is a national market for the energy and material that can be recovered or reclaimed from solid waste. This market is placed in great peril by the decision below, particularly if it is a harbinger of similar decisions yet to come.

The interstate market for energy derived from solid waste, is recognized by the United States Department of Energy and the Federal Trade Commission. On January 24, 1995, the Federal Energy Regulatory Commission (an arm of the Department of Energy), published a notice describing the efforts by a company based in Maryland, to cross state lines and build a refuse-fired power plant in Michigan. 60 Fed. Reg. 4617, 4618. In June of 1994, the Department of Energy published a solicitation for proposals demonstrating projects fueled by waste materials. The notice provided that acceptable demonstration projects would use one or more of the following fuels: "landfill debris and landfill gas; logging residues; agricultural crops and waste;. . . urban, forest, and forest product wood wastes; municipal solid waste; animal wastes and food processing wastes." 59 Fed. Reg. 33284 (June 28, 1994). The Federal Trade Commission, in a rule amending the national fuel octane certification program, recognized waste-derived fuels such as methanol, finding that:

> The majority of methanol produced in the U.S. is from natural gas resources, but it can also be produced from coal, residual oil, and biomass. . . .

> Biomass is a renewable, virtually inexhaustible domestic resource that can be used to produce methanol and ethanol. Corn is a major biomass feedstock being used today. Other biomass sources currently being used, or subject to research as potential feedstocks, including crop residues, forage (grass) crops, wood resources (forest residues and short rotation wood energy crops), and the cellulosic components of municipal solid waste. 58 Fed. Reg. 41356, 41358 (August 3, 1993).

The interstate market for raw material extracted from solid waste is also well recognized, and beginning to mature. In fact, on October 17, 1995, the Chicago Board of Trade commenced trading in "recyclable trash."[10]

It is difficult to provide accurate estimates of the amount of materials recycled in the United States. See, *Facing America's Trash*, a report of the Congress of the United States, Office of Technology Assessment, OTA-O-424, page 135. However, the New York State

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[10] This remarkable development was reported by the Gannett newspaper chain, under the headline "An exchange opens for trading recyclable trash." The article beneath read: "Chicago -- Forget junk bonds. Now they're trading junk. A national marketplace for buying and selling recyclable trash opened yesterday at the Chicago Board of Trade. The first transaction: Weyerhauser Co. bought 100 tons of old newspaper from Oswego County, N.Y." *The Reporter Dispatch*, Gannett Suburban Newspapers, October 18, 1995, Section E, page 1. The *Economist* (October 28, 1995) reported the same event under the headline: "Garbage in, business out." The *New York Times* observed (October 15, 1995) that the so-called trash exchange "would allow commodity investors to speculate on movements in their prices just like corn, oil and Treasury bonds and help users of the materials create financial hedges against price swings."

Legislative Commission on Solid Waste Management reported that in New York State, 2,974,559.4 tons of material were "marketed for recycling" in 1993; and that this material included, old newsprint, yard waste, scrap metal, glass, plastic, corrugated cardboard, wood waste, office paper, tin cans, textiles, aluminum, lead acid batteries, phone books, magazines and tires. *Where Will the Garbage Go?, supra.*, N5, at pages 6-9.

Natural resources, like all articles of commerce, including solid waste, are entitled to protection under the Commerce Clause. *Sporhase v. Nebraska*, 458 U.S. 941 (1982). See also: *Toomer v. Witsell*, 334 U.S. 385, 401 (1948); *Douglas v. Seacoast Products*, 431 U.S. 265 (1977); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948); see also *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The market participant doctrine has never been applied in a natural resource case, and because solid waste should be treated as a natural resource, it was error for the Court below to apply the market participant doctrine in this case.

C. The Market Participant Doctrine Does Not Permit Regulation of Down Stream Markets.

In *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court crafted an important limitation to the market participant doctrine, holding that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market" *Id.*, 467 U.S. at 97.

In *Wunnicke*, the Court declared as violative of the Commerce Clause a contractual requirement that timber taken from state lands be processed within the state prior to export.[11] While "Alaska . . . participates in

the timber market," the plurality wrote, it also "imposes conditions downstream in the timber processing market" in that the timber buyer "is not free to take the timber out of state prior to processing." 467 U.S. at 95. The plurality explained that the market participant doctrine "is not carte blanche to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. This Court cautioned that any broader reading of the doctrine, "has the potential of swallowing up the rule[.] *Id.*

Wunnicke recognizes that there are "limits on a state or local governments ability to impose restrictions that reach beyond the immediate parties with which the government transacts business" (*White*, 460 U.S. at n.7), and that the Commerce Clause does not permit a state to impose contractual "restrictions on the disposition" of material that has "*come to rest in private hands* (emphasis supplied)." Id., 467 U.S. at 98. It is precisely this type of restriction that the Court below validated when it approved the contractual flow control program advanced by the Town of Smithtown.

Not only does the Town's contractual flow control provision restrict the disposition of material in private hands, it also prevents out-of-state recyclers, energy production facilities, and less costly disposal sites from competing in interstate commerce for solid waste generated in the Town of Smithtown. The Town's

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[11] The contractual "flow control" provision in *Wunnicke* is very much like the contractual "flow control" provision presently at issue. "Pursuant to an Alaskan statute, the Alaska Department of Natural Resources published a notice that it would sell certain timber from state lands under a contract requiring primary manufacture (partial processing) of the timber within Alaska before the successful bidder could ship it outside of the State (emphasis supplied)" Id., 467 U.S., at 82.

contractual flow control program therefore has a direct impact on commerce occurring wholly outside the Town of Smithtown. In *Healy v. Beer*, 491 U.S. 324 (1989), this Court noted that "a state law that has the practical effect of regulating commerce occurring wholly outside that States borders is invalid under the Commerce Clause." *Id.* at 322. The Court later elaborated, stating that: [t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Id.* at 336.

The contractual flow control provision advanced by the Town, restricts economic conduct in other states. The Town imposes these restrictions, as part of a local program to regulate the residential refuse collection market. These are the actions of a market regulator, not a market participant. The court below therefore erred when it validated contractual flow control under the market participant doctrine.

IV.

THE DECISION BELOW CONFLICTS WITH A DECISION IN THE ELEVENTH CIRCUIT

The decision below conflicts with a decision in the Eleventh Circuit in *Waste Recycling, Inc. v. Southwest Alabama Solid Waste Disposal Authority*, 814 F.Supp 1566 (M.D. Ala. 1993) *aff'd sub nom United States v. Bankster*, 29 F.3d 41 (11th Cir. 1994). In *Waste Recycling*, three private carting companies challenged a series of municipal contracts and flow control ordinances which mandated that solid waste collected within the subject municipalities be delivered to a public waste disposal site owned and operated by the Alabama Solid Waste Disposal Authority. Rejecting a market participant defense, the Court "easily" found the flow control ordinances and the user contracts invalid under the Commerce Clause, holding:

> The court need not search deeply to find compelling evidence that the three cities' claim to the [market participant] doctrine is meritless -- that is, that the cities are not purchasers as was Maryland in *Alexandria Scrap*, or sellers as was South Dakota in *Reeves, Inc. v. Stake*, or bona fide interest holders in construction projects as was Boston in *White v. Massachusetts Council*. The user contracts -- which were drawn up by the Authority and signed by the three cities and upon which the ordinances are based -- expressly reflect that the intended effect of the ordinances is to assure the Authority's economic success by keeping locally generated solid waste out of interstate commerce and within the local area, and thus provide a steady and adequate supply for the Authority.

Waste Recycling, 814 F.Supp., at 1572-1573.

In refusing to grant "market participant" status to the defendant, the Court focused on the civil and criminal penalty provisions that the ordinances and users contracts imposed for flow control violations:

> The ordinances and the user contracts also contain measures that are clearly and uniquely regulatory and governmental in nature. The ordinances require public participation; prohibit private businesses from collecting and disposing of solid waste unless the businesses comply with the ordinances; prohibit businesses who fail to comply with the ordinances from using public streets to collect and haul solid waste; and threaten civil enforcement and misdemeanor penalties against violators.

814 F.Supp. at 1573.

The Court concluded that the offending flow control ordinances and related user contracts were not indicative of market participation since:

> The cities would be able to implement such provisions only because of the regulatory powers they possess as sovereigns. These are not the types of measures which private participants in the marketplace could implement

814 F.Supp. at 1573.

Since the Second Circuit came to an opposite conclusion, certiorari should be granted to resolve the conflict.

CONCLUSION

This Court should grant the writ to decide whether the market participant doctrine was properly applied, and whether the Second Circuit improperly reversed the informed decision of the District Court which granted summary judgment to petitioner.

Respectfully submitted,

Dated: November 15, 1995

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APPENDIX

APPENDIX A

Second Circuit Decision,
September 19, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1417 August Term, 1994

Argued: February 21, 1995
Decided: September 19, 1995

Docket No. 94-9192

SSC CORP.,

Plaintiff-Counter-Defendant-Appellee,

v.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and Patrick Vecchio, AS SUPERVISOR, TOWN OF SMITHTOWN,

Defendants-Counter-Claimants-Appellants.

Before: NEWMAN, Chief Judge, VAN GRAAFEILAND, and CABRANES, Circuit Judges.

Appeal from and order of the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., Chief Judge), granting appellee's motion for summary judgment. The district court found that Smithtown's flow control ordinance, as well as its waste disposal contract with SSC, impermissibly disciminated against interstate commerce in violation of the "dormant" Commerce Clause of the United States

Constitution. We agree that the ordinance is unconstitutional. The contract, however, constitutes participation by Smithtown in the waste disposal market rather than regulation of interstate commerce, and therefore is not barred by the Commerce Clause.

Affirmed in part and reversed inpart.

Michael J. Cahill, Sinnreich Wasserman, Grubin & Cahill, Hauppauge, NY (James Joyce, John Zollo, of counsel) for defendants-counter-claimants-appellees.

Leon Friedman, New York City (David L. Snyder, Snyder & Snyder, White Plains, NY, of counsel), for plaintiff-counter-defendant-appellee.

JOSE A. CABRANES, Circuit Judge:

A law professor at Harvard is said to have remarked facetiously, a generation ago, that the greatest constitutional cases had concerned the sale and distribution of milk. The story might well be apocryphal as well as hyperbolic but there is truth to the statement, evidenced by the ubiquity of milk in the Supreme Court's Commerce Clause jurisprudence.[1] Although the

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[1] See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) (invalidating Florida regulation reserving to local producers a substantial share of local milk market); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) (striking down city ordinance forbidding sale of milk unless bottled and pasteurized within five miles of city center); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949) (invalidating New York's refusal to permit Massachusetts milk distributor to build additional purchasing center in New York, which would divert locally produced milk to out-of-state markets); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939) (upholding Pennsylvania statute establishing minimum prices to be paid to in-

flood of milk cases has receded in recent years, it has given way to a federal docket that is just as clogged with -- of all things -- garbage. No fewer than six times in the past seven years as the Supreme Court granted certiorari to decide a case involving the disposal of solid or hazardous waste.[2]

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state dairy farmers, on grounds that effect on interstate commerce was incidental); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 97, 79 L.Ed. 1032 (1935) (striking down New York statute setting minimum price for milk dealers to pay to in- or out-of-state dairy farmers); *Schollenberger v. Pennsylvania*, 171 U.S. 1, 18 S.Ct. 757, 43 L.Ed. 49 (1898) (invalidating Pennsylvania statute banning importation of oleomargarine--a butter substitute--for sale); see also *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (upholding New York milk price controls against due process and equal protection challenges). More recent cases include *West Lynn Creamery, Inc. v. Healy*, --- U.S. ----, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (invalidating Massachusetts program assessing nondiscriminatory tax on all milk sold in state, but using proceeds of that tax to subsidize only in-state dairy farmers), *Id.* at ---- n. 22, 114 S.Ct. at 2218 n. 22 (commenting on "the surprisingly large number" of cases involving dairy farmers in Commerce Clause jurisprudence), and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976) (striking down Mississippi regulation permitting out-of-state milk to be sold in Mississippi only if the state of origin accepted Mississippi milk on a reciprocal basis).

The nexus between milk and garbage is significant, but often overlooked. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (rejecting Commerce Clause challenge to Minnesota statute prohibiting distribution of milk in nonrecyclable, nonreturnable plastic containers).

[2] *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *Oregon Waste*

Not long ago, municipalities took out the trash simply by hauling it to the local dump.[3] But as landfills have reached the bursting point, and as environmental regulations have burgeoned,[4] local governments have been forced to make significant investments and become more innovative in safely and legally disposing of trash. These investments and innovations include the multifarious transfer stations, recycling centers, and incinerators that have mushroomed throughout the land in the past decade.

Smithtown, New York, responded to the environmental and regulatory crisis by arranging with the neighboring town of Huntington for the construction of a garbage incinerator -- an incinerator that would be owned and operated by a private company, but financed by the towns. The two towns hoped that the incinerator would stem the flow of solid waste filling up the town dump, put the garbage to practical use by generating electricity, and ensure a reliable method of waste disposal for town residents for years to come. As part of its overall solid waste plan, and to protect its financial

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Sys., Inc. v. Department of Envtl. Quality, --- U.S. ----, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); *Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *New York v. United States*, 505 U.S 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (holding that Congress may not compel states to enact legislation through coercive "take title" provisions regarding hazardous waste); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

[3] See *Carbone*, 114 S. ct. at 1693 (Souter, J., dissenting).

[4] See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601-9657 (1988 & Supp. V 1993).

investment in the incinerator, Smithtown pursued two parallel strategies. First, it passed a "flow control" ordinance that required all residential and commercial garbage generated in town to be disposed of at the incinerator, where Smithtown charges so-called "tipping fees" based on the amount of garbage dumped.[5] Second, Smithtown created a residential garbage collection district and entered into a contract with private garbage haulers to pick up all household garbage in the district. Under the terms of the contract, the haulers were required to bring that garbage to the incinerator.

The United States District Court for the Eastern District of New York (Thomas C. Platt, Chief Judge) invalidated both the ordinance and contract under the dormant Commerce Clause of the United States Constitution,[6] relying on the Supreme Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), that a similar ordinance impermissibly discriminated against interstate

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[5] "Sometimes referred to as a gate fee or disposal charge, the term 'tipping fee' is derived from the fact that trucks delivering waste must 'tip' the back-end of the truck to drop off the waste." Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 FORDHAM URB. L.J. 361, 369 n. 46 (1995).

[6] The Commerce Clause provides that "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The term "dormant" Commerce Clause refers to the negative implications of that constitutional provision that limit the authority of state and local governments that either discriminate against, or unduly burden, interstate commerce. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, --- U.S. ----, ----, 115 S.Ct. 1331, 1335, 131 L.Ed.2d 261 (1995).

commerce. Smithtown asks this court to distinguish the virtues of its flow control ordinance and residential garbage collection contract from the vices of the flow control ordinance struck down in Carbone. Smithtown contends primarily that its extensive financial stake in the local incinerator makes the town a "market participant" in the waste disposal market, and therefore exempts both its flow control ordinance and contract from the proscriptions of the Commerce Clause.

We conclude that Smithtown's flow control ordinance -- enforceable by criminal fines and jail terms -- clearly constitutes municipal regulation of the waste disposal market, not participation in that market, thus subjecting the ordinance to Commerce Clause scrutiny. Following the Commerce Clause analysis set forth by the Supreme Court in *Carbone*, we are compelled to find that the ordinance impermissibly discriminates against interstate commerce. On the other hand, we find that Smithtown's garbage hauling contract with SSC constitutes municipal participation in both the waste collection and disposal markets, and is thus free from the strictures of the Commerce Clause.

Accordingly, we affirm the district court's judgment striking down the flow control ordinance, but reverse its invalidation of the contract.

I. FACTS

A. Background

Smithtown is a municipality in northwestern Suffolk County on Long Island, New York, with a population of approximately 125,000. In the mid-1980s, following the adoption of various federal[7] and New York

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[7] The Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub.L. No. 94-580 (codified at 42 U.S.C. §§6901-6902), for example, required states receiving federal financial assistance under the Act to "prohibit the establishment of new open dumps" and to require all

State[8] policies designed to upgrade or replace old landfills that were either full or unsafe, Smithtown began negotiations with the neighboring town of Huntington to provide joint waste disposal service for residents of both towns. The towns entered into a municipal agreement, authorized by special state statute, to share Smithtown's existing landfill and Huntington's incinerator, whose construction was underway but incomplete at the time of the agreement.[9]

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solid waste to be either "utilized for resource recovery" or "disposed of in sanitary landfills" that satisfy standards promulgated by the U.S. Environmental Protection Agency. 42 U.S.C. § 6943(a)(2) (1988). The legislation provides some leeway for a state to upgrade its open dumps to sanitary landfills, provided that it establish an approved timetable for compliance. Id. § 6945. Pursuant to RCRA, the EPA has promulgated minimum national criteria for municipal solid waste landfills in Part 258 of 40 C.F.R. (1994).

[8] The Long Island Landfill Law, 1983 N.Y.Laws 299 (codified at N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984)), phased out the practice of landfilling raw garbage, prohibited development of new landfills in deep flow groundwater recharge zones, and designated resource recovery, incineration, or composting as the preferred alternatives for disposal of municipal solid waste on Long Island.

[9] In December 1989, the towns of Smithtown and Huntington executed a Municipal Cooperation Agreement under Article 5G of the General Municipal Law of the State of New York. See N.Y.GEN.MUN.LAW §§ 119-m to -oo (McKinney 1986 & Supp.1994). Under this agreement, the two towns assumed joint responsibility for the obligations originally incurred by Huntington in its Service Agreement with the operator of the incinerator, and in related agreements with the New York State Environmental Facilities Corporation and the State of New York, both of which contributed grant funds to the project. The

The incinerator was built and is operated by a private company, Ogden Martin Systems ("Ogden"),[10] on land owned by the town of Huntington. The service contract between Ogden and the towns stipulates that Ogden "is the sole owner" of the incinerator, and that the towns are "customer[s] only."

The towns financed construction of the incinerator through tax-free bonds issued by the New York State Environmental Facilities Corporation, a public authority. The bonding authority lent the proceeds from the bonds to Ogden to build the incinerator. These bonds are secured primarily by a twenty-five year contractual obligation of Smithtown and Huntington to reimburse Ogden for the construction and operation costs of the incinerator. This obligation is known as the "Service Fee," and is payable regardless of whether any waste is delivered to the incinerator. Accordingly, the towns pay the Service Fee to Ogden, which repays the state bonding authority, which in turn repays the bondholders. To satisfy its share of the Service Fee, Smithtown relies on funds from two sources: (1) ad valorem property taxes and (2) tipping fees at the incinerator.

In return for paying the Service Fee, Smithtown and Huntington own exclusive rights to decide what waste may be disposed at the incinerator, and thus to charge tipping fees for garbage that is dumped there.

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towns also agreed to share certain obligations incurred by Smithtown to expand its existing landfill. Each town is entitled to equal access and use of both the Huntington incinerator and the Smithtown landfill under the municipal agreement.

[10] Ogden is a Delaware corporation that formed a Delaware limited partnership, C-E Huntington L.P., as a special subsidiary to construct and operate the Huntington incinerator.

B. The Flow Control Ordinance

To ensure a steady flow of garbage to the Huntington incinerator (and thus to ensure a steady flow of tipping fees), Smithtown enacted a "flow control" ordinance in 1991 that provides as follows:

> No person authorized to collect or transport acceptable waste within the Town of Smithtown shall dispose of acceptable waste generated within the Town of Smithtown except at a solid waste management facility designated by the Town Board pursuant to this section.

SMITHTOWN CODE § 177-17(B) (1994).[11] Pursuant to this ordinance, Smithtown's Town Board designated the Huntington incinerator as the disposal site for both residential and commercial garbage[12] generated in town.

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[11] The town code defines "acceptable waste" as

> Only solid waste acceptable at specific town-designated facilities, including but not limited to garbage, trash, rubbish, refuse, construction and demolition materials and yard waste that are normally disposed of by and collected from residential, commercial, industrial, governmental, community facilities or institutional establishments, except that "acceptable wastes" shall not include unacceptable waste and recyclables.

SMITHTOWN CODE § 177-4 (1994). "Unacceptable waste" and "recyclables" are defined elsewhere in the town code.

[12] For convenience, this opinion will use the terms "garbage" and "acceptable waste" interchangeably.

For recyclables, the Board designated the adjacent town recycling center. Smithtown charges tipping fees of $65 per ton of garbage dumped at the incinerator, but imposes no charges for recyclables brought to the recycling center. Id. § 177-83(D)(1)-(2). The town charges tipping fees for garbage only in order to encourage haulers to divert recyclables out of the solid waste stream.

Violation of the flow control ordinance is an unclassified misdemeanor, punishable by a fine of up to $5,000 and up to 60 days' imprisonment. Id. § 177-102.

C. The Improvement Contract

The second major step in Smithtown's solid waste plan was to arrange for municipal garbage collection and disposal for all town residents. In 1991, the town divided its residential areas into ten improvement districts and solicited competitive bids for waste collection services in each district.[13] The town also drew up a standard form contract (the "Improvement contract"), which all successful bidders had to sign, and which required them to dispose of residential garbage at the Huntington incinerator. Accordingly, they must factor into their bids the $65 per ton tipping fee charged by Smithtown for using the incinerator, and an estimate of the amount of waste generated in the district for which they are bidding.[14]

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[13] The improvement districts include all residences in Smithtown, except for those in three incorporated villages.

[14] "It is the responsibility of ... each Prospective Bidder to determine to their own satisfaction, the quantity of Residential Solid Waste to be generated in each Contract Bid Area and to include the costs for disposal of the residential solid waste, at the prescribed tipping fees, in the Itemized Bid Proposal." § 1.07(A)(2), Contract.

Smithtown awarded seven of the ten residential contracts to SSC. SSC began to pick up household garbage in January 1992. In compliance with contract requirements, SSC used Smithtown's published tipping fee of $65 per ton at the Huntington incinerator to arrive at a proposed annual disposal cost of approximately $92 per household. This disposal cost, added to an estimate of $126 per household for collection service, amounted to a total bid of $218 per household in 1994.

Smithtown assessed that $218 as a user fee on each residential homeowner's annual property tax bill. The town then used that user fee to pay SSC under the Improvement contract.

In early April 1994, Smithtown accused SSC of breaching the contract by diverting town residential garbage to disposal facilities other than the Huntington incinerator. SSC was allegedly pocketing the difference between the $65 per ton tipping fees built into the contract and reimbursed by Smithtown, and lower fees charged at other disposal facilities. By resolution of the Town Board, Smithtown withheld more than $750,000 in contract payments from SSC.

On April 28, 1994, SSC filed this action pursuant to 42 U.S.C. § 1983 (1988), seeking to enjoin Smithtown from enforcing the contractual provisions and the flow control ordinance, to the extent that those provisions required the hauler to deliver all town garbage to the Huntington incinerator.[15] SSC claimed that both the

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[15] SSC collects residential garbage in Smithtown pursuant to the Improvement contract, and commercial garbage pursuant to private agreements with various Smithtown businesses. SSC has not challenged Smithtown's authority to create improvement districts for the collection of residential garbage, or to contract with a private company to collect that garbage. Instead, the plaintiff garbage hauler only contests Smithtown's right to include in the contract the requirements that

contract and the ordinance violated the Commerce Clause. Smithtown counterclaimed for breach of contract.

After the Supreme Court handed down its decision in *C & A Carbone, Inc. v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), Chief Judge Platt granted summary judgment for SSC. In a terse oral ruling, the judge stated that the Smithtown waste control program -- both the flow control ordinance and the Improvement contract -- violated the dormant Commerce Clause under *Carbone*. Smithtown appeals.

II. DISCUSSION

A. The Legal Standard: The Dormant Commerce Clause & The Market Participant Doctrine.

1. Dormant Commerce Clause

The Commerce Clause is primarily an affirmative grant of power to Congress. "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." U.S. CONST. art. I, § 8, cl. 3. The power to regulate interstate commerce is extraordinarily far-reaching[16] and authorizes Congress to preempt a broad spectrum of

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SSC bring its garbage to a designated waste disposal facility.

[16] See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (rejecting Commerce Clause challenge to Congress's enactment of employment regulations applicable to the states). There are, however, some limits to this power. See *United States v. Lopez*, --- U.S. ----, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (invalidating federal statute that criminalizes possession of firearms within school zones, as exceeding Congress's power to regulate interstate commerce).

state regulations. If Congress has not exercised its commerce powers in a given area, states can generally legislate over that area until Congress chooses to step in. Thus, most laws regulating commerce are written upon a sort of legal palimpsest: state laws remain on the books until Congress chooses to overwrite them.

The Supreme Court, however, has long interpreted the Commerce Clause "not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). Accordingly, the Court has treated at least some core area of interstate commercial regulation not as a palimpsest, but rather as a tabula that must remain rasa until Congress decides to legislate. Whether or not the Founders intended this "negative" or "dormant" component to the Commerce Clause has been hotly debated.[17] In any event, federal courts have

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[17] See, e.g., *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 259-65, 107 S.Ct. 2810, 2826-29, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) (arguing that Framers did not intend "negative" or "dormant" component of Commerce Clause); *Itel Containers Int'l Corp. v. Huddleston*, --- U.S. ----, ----, 113 S.Ct. 1095, 1106, 122 L.Ed.2d 421 (Scalia, J., concurring in part and concurring in the judgment) (concurring in enforcement of dormant Commerce Clause on stare decisis grounds); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 12 (1937) (describing absence of comment during drafting and ratification of Constitution regarding possible negative implications of Commerce Clause); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN.L.REV. 432, 493 (1941) (arguing that historical evidence "supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the

for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce, even in the absence of conflicting congressional legislation. See generally *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 272, 21 L.Ed. 146 (1873) ("[T]he domain of the [federal government] should be preserved free from invasion, and ... no State legislation should be sustained which ... assumes to regulate, or control subjects committed by th[e] Constitution exclusively to the regulation of Congress."); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319, 13 L.Ed. 996 (1851) ("Whatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200, 6 L.Ed. 23 (1824) (Marshall, C.J.) (implying that a state oversteps its powers when it regulates interstate commerce because "it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do").

In applying the dormant Commerce Clause, the courts have identified guiding principles -- limiting "protectionist" state legislation and fostering the development of a unified national market--that presumably motivated the Founders to endow Congress with the affirmative power to regulate commerce. As Justice Jackson wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his

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federal government presupposed the withdrawal of authority pari passu from the states.").

> exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 665, 93 L.Ed. 865 (1949), quoted in *West Lynn Creamery, Inc. v. Healy*, --- U.S. ----, ----, 114 S.Ct. 2205, 2218, 129 L.Ed.2d 157 (1994). The Court has defined "protectionist" state legislation as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988).

To implement the goals of curbing local protectionism and facilitating a national market, the courts have derived from the Commerce Clause limitations on the states' abilities to legislate in service of parochial interests. State regulations that discriminate against interstate commerce are subject to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). By "discrimination," we mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, --- U.S. ----, ----, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994). "But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 [(1970)]...." In *Pike*, the Court explained that a state regulation having only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive

in relation to the putative local benefits." 397 U.S. at 142, 90 S.Ct. at 847. When weighing burdens against benefits, a court should consider both "the nature of the local interest involved, and ... whether it could be promoted as well with a lesser impact on interstate activities."

2. The Market Participant Exception

The Commerce Clause only grants to Congress -- and correspondingly withholds from the states -- the power to "regulate Commerce ... among the several States." (emphasis added). Because the power conferred by the Constitution is the power to "regulate," the strictures of the dormant Commerce Clause are not activated unless a state action may be characterized as a "regulation." At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between "regulation" of, and "participation" in, a market. When a state engages in market "participation" -- that is, when it enters the open market as a buyer or seller on the same footing as private parties -- there is less danger that the state's activity will interfere with Congress's plenary power to regulate the market. As the Court has explained, the Commerce Clause "restricts 'state taxes and regulatory measures impeding free private trade in the national marketplace,' but '[there] is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.' " *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289, 106 S.Ct. 1057, 1062, 89 L.Ed.2d 223 (1986) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 2277, 65 L.Ed.2d 244 (1980)). Pursuant to this doctrine -- the "market participant" exception to the dormant Commerce Clause -- states are permitted to enter a market with the same freedoms and subject to the same restrictions as a private party.[18] To the extent

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[18] The "market participant" doctrine applies to local as well as state governments. See *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 103 S.Ct.

that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals -- just as if it were a private party.

The Supreme Court introduced the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976), which upheld a Maryland program that offered bounties to scrap processors to destroy abandoned automobile hulks. Because Maryland required out-of-state processors, but not in-state processors, to submit burdensome documentation to claim their bounties, the state effectively favored in-state processors over out-of-state processors. The Court held that because the state was merely attaching conditions to its expenditure of state funds, the Maryland program affected the market no differently than if Maryland were a private company bidding up the price of auto hulks. Because the state was not "regulating" the market, its economic activity was not subject to the antidiscrimination principles underlying the dormant Commerce Clause -- and the state could impose different paperwork burdens on out-of-state processors. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. at 810, 96 S.Ct. at 2498 (footnotes omitted).

1042, 75 L.Ed.2d 1 (1983) (finding that city of Boston is market participant). Because the Commerce Clause only governs the category of activity known as "market regulation," the determination that an actor is "participating" in the market places that activity outside the purview of Commerce Clause restrictions, whatever the identity of the actor. This differs from Eleventh Amendment doctrine, for example, where the states, but not local governments, enjoy immunity from suit in federal court. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n. 54, 98 S.Ct. 2018, 2035 n. 54, 56 L.Ed.2d 611 (1978).

The Court next invoked the market participant exception in *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980), permitting South Dakota to confine sales from a state-owned cement factory to state residents. Noted the majority:

> [S]tate proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedom from federal constraints, including the inherent limits of the Commerce Clause.

447 U.S. at 439, 100 S.Ct. at 2278. Like any other purveyor of cement, South Dakota enjoyed "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' " *Id.* at 438-39, 100 S.Ct. at 2278 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919)). The Court reiterated this holding in *Wyoming v. Oklahoma*, 502 U.S. 437, 458, 112 S.Ct. 789, 802, 117 L.Ed.2d 1 (1992), where the Court stated that under the market participant doctrine, Oklahoma faced no Commerce Clause obstacle in directing its state-owned power plants to burn at least ten percent Oklahoma-mined coal. [19] Like any other buyer in the coal market, Oklahoma could buy its coal from whomever it pleased--meaning that the state could favor its own residents when spending state funds.

In *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), the Supreme Court held that the city of Boston

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[19] The Court ultimately struck down the Oklahoma statute because it also applied to privately owned power plants. 502 U.S. at 454-59, 112 S.Ct. at 800-02.

was a participant in the labor market, and thus was not "regulating" commerce in violation of the Constitution in requiring all city-funded construction projects to be performed by a work force of at least fifty percent Boston residents. The practical effect of this order was to require all city building contractors to hire half of their workers from Boston. While the Court agreed that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," it declined to

> define those limits with precision, except to say that we think the Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the [employment mandate] covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the [mandate] is, in a substantial if informal sense, "working for the city."

Id. at 211 n. 7, 103 S.Ct. at 1046 n. 7. As a purchaser of construction services, Boston was essentially participating in the construction labor market. Because the money for the workers was coming indirectly from the Boston treasury, the city was allowed to favor its own citizens without running afoul of the dormant Commerce Clause.

One year later, the Supreme Court rejected Alaska's invocation of the market participant doctrine in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (plurality opinion with respect to market participant question). Alaska had instituted a program of selling timber at a significantly reduced price from state-owned forests only on the condition that buyers agree to process that timber at in-state facilities prior to export. The Court held that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a

regulatory effect in the processing market, in which it is not a participant." *Id.* at 98, 104 S.Ct. at 2245. As the Court pointed out, a private seller of goods has no proprietary interest in what the buyer later does with those goods when the seller is not a participant in a downstream market. See *id.* at 96, 104 S.Ct. at 2245. Inasmuch as Alaska retained no proprietary interest in the timber after the point of sale, the state could not be considered a participant in the downstream processing market. Unlike the programs at issue in Alexandria Scrap, Reeves, and White, Alaska's timber sales did not involve the direct expenditure of state funds. Instead, the state was trying to coerce private parties to use their own money to patronize local industries.

B. Smithtown's Flow Control Ordinance

1. Market Participation

Before determining whether Smithtown's flow control ordinance constitutes discriminatory or burdensome regulation of interstate commerce, we must first answer a threshold question: Is the ordinance a "regulation" at all, or does it merely constitute "participation" by Smithtown in the local waste disposal market?[20]

SSC argues that Smithtown's flow control ordinance cannot be considered municipal "participation" in the waste disposal market because the ordinance constitutes an exercise of the town's

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[20] We note preliminarily that the market participant doctrine was not mentioned in any of the several opinions in Carbone. Although in his dissent Justice Souter contended that the Clarkstown transfer station was "essentially a municipal facility," --- U.S. at ----, 114 S.Ct. at 1696, he did not argue that the town's favoritism of the transfer station therefore constituted participation in the waste disposal market that was exempt from Commerce Clause analysis.

"sovereign powers of civil and criminal enforcement." Smithtown responds, first, that it is generally a "participant" in the waste disposal market because it has placed substantial public funds at risk by assuming extensive financial obligations in connection with the Huntington incinerator. The town further contends that the flow control ordinance is valid under the market participant exception because it protects the town's financial investment in the incinerator. We agree with SSC.

To the extent that the flow control ordinance threatens garbage haulers with criminal fines and jail terms if they fail to do business with Smithtown at the Huntington incinerator, the town is engaging in market regulation, not market participation. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701, 717 (3d Cir.1995) (rejecting argument that flow control ordinance constituted market participation where county purchased landfill services for resale and required garbage haulers to buy those services from county). No private company in the open market could force others to buy its services under pain of criminal penalties. See *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627, 631 (9th Cir.1982) (rejecting market participation characterization of program relying on "civil and criminal penalties which only a state and not a mere proprietor can enforce"), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

Smithtown points to language in *South-Central Timber* stating that although Alaska "may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant," 467 U.S. at 98, 104 S.Ct. at 2245 (emphasis added). According to Smithtown, the Court was suggesting that Alaska's local processing requirements would have been exempt from Commerce Clause scrutiny if the state had somehow participated in the processing market -- for example, by owning a few timber mills. This argument is

refuted by *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992), where the Court struck down an Oklahoma statute requiring all in-state electrical utilities (both private and public) to use at least ten percent Oklahoma-mined coal to fuel their power plants. The Court acknowledged that with respect to state-owned utilities, Oklahoma was participating as a purchaser in the coal market and therefore could decide to purchase only local coal. But simply because Oklahoma was in one respect a "participant" in the coal market did not mean that in all respects its activity affecting the coal market constituted "market participation." A state's actions constitute "market participation" only if a private party could have engaged in the same actions. For this reason, the Court invalidated as "regulation" Oklahoma's imposition of a local-purchasing requirement on private market participants, even though it found the state otherwise to be a "participant" in the local coal market.

Smithtown also draws our attention to *City of Philadelphia v. New Jersey*, 437 U.S. at 627 n. 6, 98 S.Ct. at 2537 n. 6, where the Supreme Court reserved decision as to whether operation of a landfill by a government would constitute market participation. In *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir.1989), *cert. denied*, 493 U.S. 1077, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990), the Court of Appeals answered that question in the affirmative, holding that a local government operating a landfill was a market participant and could charge a lower fee for the disposal of locally generated waste. Smithtown argues that the Huntington incinerator, like the county landfill in Swin, is essentially a "municipal facility" that should qualify as "market participation" by the town. If Smithtown merely used favorable rates to entice town residents to use the local incinerator, it would be acting as a market participant as in *Swin*. The difference between the Smithtown ordinance and the arrangement challenged in Swin, however, is that Smithtown has established criminal penalties that effectively compel parties to buy services there. We agree with the Third Circuit that

> [w]hen a public entity participates in a market, it may sell and buy what it chooses, to or from whom it chooses, on terms of its choice; its market participation does not, however, confer upon it the right to use its regulatory power to control the actions of others in that market.

Atlantic Coast, 48 F.3d at 717. Thus, we conclude that Smithtown's flow control ordinance constitutes a "regulation" of the waste disposal market, rather than participation in that market. Hence, the ordinance is subject to Commerce Clause scrutiny. *White*, 460 U.S. at 210, 103 S.Ct. at 1046 ("Impact on out-of-state residents figures into the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.").

2. Commerce Clause Analysis

Our finding that the market participant exception does not apply to Smithtown's flow control ordinance compels us to turn to the question of whether the ordinance violates the Commerce Clause. Our analysis is governed by the recent case of *C & A Carbone v. Town of Clarkstown*, --- U.S. ----, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), where the Supreme Court invoked the antidiscrimination principle of Commerce Clause jurisprudence to strike down a flow control ordinance enacted by Clarkstown, a community similar to Smithtown. Like Smithtown, Clarkstown had been experimenting with ways to ensure a cheap, reliable, and environmentally sound method of disposing of town garbage. Under pressure from state environmental agencies, Clarkstown agreed to close its old landfill and replace it with a new solid waste transfer station. The Court described Clarkstown's solution as follows:

> The cost of building the transfer station was estimated at $1.4 million. A local private contractor agreed to construct the facility and operate it for five years, after which the town would buy it for one dollar. During those five years, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge the hauler a so-called tipping fee of $81 per ton. If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit. The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees.
>
> The problem, of course, was how to meet the yearly guarantee. This difficulty was compounded by the fact that the tipping fee of $81 per ton exceeded the disposal cost of unsorted solid waste on the private market. The solution the town adopted was [a] flow control ordinance.... requir[ing] all nonhazardous solid waste within the town to be deposited at the [new] transfer station.... Noncompliance is punishable by as much as a $1,000 fine and up to 15 days in jail.

Id. at ----, 114 S.Ct. at 1680. After passage of the flow control ordinance, Carbone continued to ship solid waste to out-of-town transfer stations that charged lower tipping fees. Clarkstown sought a court order forcing Carbone to bring its garbage to the town's preferred transfer station.

The Supreme Court held that Clarkstown's flow control ordinance violated the dormant Commerce Clause. In the Court's view, the ordinance discriminated against interstate commerce in that it was "just one more

instance of local processing requirements" that are prohibited by the Commerce Clause. *Id.* at ----, 114 S.Ct. at 1682. The problem, the Court said, was that the ordinance hoarded a local resource -- the demand for processing solid waste -- for the benefit of a single local business. *Id.* at ----, ----, 114 S.Ct. at 1682, 1683. It made no difference that Clarkstown discriminated equally against out-of-state and in-state businesses in favoring a single local processor. In the Court's opinion, this only made "the protectionist effect of the ordinance more acute." *Id.* at ----, 114 S.Ct. at 1683. Because the Court found that the ordinance facially discriminated against interstate commerce, it subjected the Clarkstown ordinance to heightened scrutiny. "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Id.; see also *City of Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2535 ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.").

That the flow control ordinance was at bottom a financing measure, aimed at ensuring the viability of the new transfer station, did not excuse its discriminatory effect on interstate commerce. The Court stated that

> revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State.
>
> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town

> may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Carbone, --- U.S. at ----, 114 S.Ct. at 1684 (citations omitted).

Carbone compels us to find that Smithtown's flow control ordinance facially discriminates against interstate commerce because it directs all town waste to a single local disposal facility, to the exclusion of both in-state and out-of-state competitors. Accordingly, Smithtown must "demonstrate, under rigorous scrutiny, that it has no other means [than its flow control ordinance] to advance a legitimate local interest." *Id.* at ----, 114 S.Ct. at 1683. In *Carbone*, Clarkstown's interest in ensuring safe, clean processing of town waste was insufficient to justify its flow control ordinance, since the town could have achieved the same result by enacting uniform health and safety regulations. *Id.* at ----, 114 S.Ct. at 1683. Likewise, the town could have achieved its goal of ensuring the financial viability of the local transfer station through general taxes or municipal bonds. *Id.* at ----, 114 S.Ct. at 1684. Because all of these options (and others) are open to Smithtown, its flow control ordinance cannot survive the "rigorous scrutiny" standard mandated by Carbone. We therefore find that the ordinance violates the dormant Commerce Clause.

B. Smithtown's Improvement Contract

Smithtown's improvement contract with SSC stands on more solid ground than does its flow control ordinance, inasmuch as we find that the contract constitutes market participation, rather than regulation. The central question in determining whether the contract constitutes "market participation" by Smithtown is whether it more closely resembles Boston's local-hiring requirements in *White*, or Alaska's local-processing requirements in *South-Central Timber*. In both cases, the government reached beyond "the boundary of formal privity of contract" to influence the

economic relationships between its trading partners and other parties. See *South-Central Timber*, 467 U.S. at 96, 104 S.Ct. at 2245; *White*, 460 U.S. at 211, 103 S.Ct. at 1046. Smithtown has done the same thing by contractually obligating SSC to do business at the Huntington incinerator. SSC argues that this violates the Commerce Clause because Smithtown, like Alaska in South-Central Timber, is flexing its economic muscle in the waste collection market to regulate the downstream market of waste disposal. We disagree.

Smithtown is a "major participant" in two "discrete, identifiable class[es] of economic activity": waste collection and waste disposal. See *White*, 460 U.S. at 211 n. 7, 103 S.Ct. at 1046 n. 7. When town garbage is picked up at the curb, and town garbage is burned to ash in the incinerator, Smithtown is "substantial[ly] if informal[ly]" receiving garbage collection and disposal services -- services for which it has chosen to "contract out" rather than to perform itself with town employees and town equipment. *Id.*

Smithtown is spending tax dollars to pay for both of these services, just as Boston was spending tax dollars to pay the salaries of its contractors' construction workers in *White*. "Insofar as the city expended only its own funds in entering into [waste disposal] contracts for public projects, it [is] a market participant...." *Id.* at 214-15, 103 S.Ct. at 1048.

If Boston could require contractors for city-funded projects to hire a certain percentage of city residents, then Smithtown can require SSC to hire town residents to drive its garbage trucks -- since those truck drivers would be "in a substantial if informal sense, 'working for the city.' " *Id.* at 211 n. 7, 103 S.Ct. at 1046 n. 7. And if Smithtown can require SSC to hire local truck drivers, then it can require the hauler to use local incinerating services as well. It makes no difference in our estimation whether those services are provided by a private company like Ogden, or by a public entity like Smithtown. Because the waste disposal services are

"substantial[ly] if informal[ly]" being provided to Smithtown, the town can decide with whom it will deal.

The itemization of "disposal" and "collection" charges on SSC's bid for the improvement contract reinforces our conclusion that Smithtown is a buyer, rather than a regulator, of disposal services, the ordinance and its criminal penalties notwithstanding. Because Smithtown pays the disposal portion of the bid to reimburse SSC for tipping fees at the Huntington incinerator, the disposal costs are "passed through" SSC to town residents -- who ultimately foot the bill for disposal through user fees assessed on their annual property tax bill.

There are four principal reasons why Smithtown charges SSC tipping fees at the incinerator and then reimburses SSC for those charges, instead of charging no tipping fees at the incinerator and simply keeping the taxpayers' user fees in the first place. First, and most importantly, Smithtown's tipping fees combat the free-rider problem (or free-dumper problem, as it were), by discouraging SSC and the other contract haulers from insinuating out-of-town garbage into the waste they bring to the Huntington incinerator. Second, by charging haulers $65 to dump a ton of garbage, but nothing to dump recyclables, Smithtown encourages its waste haulers to abide by their contractual obligation to separate recyclables from the waste stream. Third, the pass-through mechanism encourages bidders to forecast accurately the amount of waste generated in each improvement district, and not to "low-ball" their estimates to win the contract. If each bid area in the district generates less waste than contemplated by the prevailing estimate, the contractor keeps the difference between the bid and the actual disposal costs. If the area generates more garbage than expected, the hauler must still pay the tipping fees and absorb the excess. Fourth, by itemizing the disposal costs in the contract, Smithtown can easily adjust its charges to town residents in the event of a change in tipping fees. Thus, the principal purpose of the pass- through mechanism is to

minimize the town's costs of monitoring SSC's performance under the contract. That SSC pays tipping fees to use the incinerator does not detract from the reality that Smithtown is the one consuming--and ultimately paying for--those disposal services.

SSC directs our attention to *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566, 1570, 1575-77 (M.D.Ala.1993), *aff'd sub nom. Waste Recycling v. SE Al Solid*, 29 F.3d 641 (11th Cir.1994), where the court rejected application of the market participant doctrine to a garbage collection and disposal contract much like the one between Smithtown and SSC. An ordinance passed by the town of Geneva, Mississippi, vested in the town title to all locally generated waste, and prohibited private garbage collectors from contracting directly with generators of solid waste. The court refused to characterize the contract as market participation, on the theory that the town was not motivated purely by profit-making concerns, id. at 1573, and that it had no true proprietary interest in the garbage, id. at 1576.

We decline to adopt the reasoning of the *Waste Recycling* court. First, it is well established that a protectionist motive does not automatically render state activity "regulation." As the Supreme Court stated in *Reeves*:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and

> agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State.

447 U.S. at 442, 100 S.Ct. at 2280. In the three cases where the Supreme Court found that a state or city engaged in market participation, the government's motive in enacting the challenged legislation was admittedly not to maximize its own profits as a private company would. Rather, Boston sought to stimulate local employment in *White*; South Dakota sought to provide cheap products for state residents in *Reeves*; and Maryland aimed to abate a public nuisance in *Alexandria Scrap*.

Second, a town need not possess a proprietary interest in the garbage itself in order to place contractual restrictions on its disposal. As the Supreme Court observed in *Carbone*, the article of commerce is not merely the physical trash sitting in barrels or dumpsters, but also the demand for garbage processing and disposal services. *Carbone*, --- U.S. at ----, 114 S.Ct. at 1682. As discussed earlier, Smithtown has a very real interest in both the collection and disposal services, since it pays for both. If the town wished, it could perform these traditional municipal services itself (with public employees), or it could contract for each service separately. When the town buys the two in a bundle, it participates in the waste disposal market just as directly as -- indeed, even more directly than -- Boston participated in the labor market in *White*.

Our conclusion that Smithtown has an identifiable interest in the disposal of its garbage is reinforced by the towns' vulnerability to liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a) (1988), if they "arrange" for the

disposal and treatment of municipal solid waste. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir.1992) (holding municipalities subject to "arranger" liability under CERCLA). If Smithtown could not contractually designate where its waste should be disposed, it would be powerless to stave off future CERCLA liability. Because the specter of CERCLA liability is intended to encourage "arrangers" of waste disposal to select environmentally secure disposal sites, Congress clearly contemplated that towns would have some voice as to the selection of those sites.

That Smithtown has favored itself, rather than some private company, as the provider of disposal services does not affect our analysis. As discussed earlier, it is true that Smithtown "participates" in the waste disposal market not only as a buyer of disposal services from SSC, but also as a buyer of services from Ogden and a re-seller of those services to SSC. But while these latter two forms of doing business may constitute "market participation" on the part of Smithtown, they do not necessarily determine whether another town action -- buying disposal services through the improvement contract -- also constitutes market participation. Smithtown could not force SSC or anyone else to do business with the town as a seller of disposal services at the Huntington incinerator, without resorting to its police powers -- and thereby acting as a market regulator. But because Smithtown is substantially the buyer (and consumer) of those services, it can dictate by contract where SSC must purchase the waste disposal services provided to the town.

Finally, we address SSC's contention that Smithtown should not be considered a market participant, on the theory that such a characterization would subject the town to the antitrust laws. The logic of this argument escapes us. First, it is far from clear that treating Smithtown as a "market participant" for Commerce Clause purposes necessarily subjects it to the antitrust laws. As the Supreme Court held in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389,

413, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978) (plurality opinion), the antitrust laws do not prohibit local governments from engaging in anticompetitive conduct "pursuant to state policy to displace competition with regulation or monopoly public service." See also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982) (holding that municipalities are entitled to antitrust immunity "to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy"). Smithtown's efforts to guarantee business for the Huntington incinerator have been actively encouraged by the State of New York, through its legislature, and thus would seem to enjoy antitrust immunity.[21] See *Hybud Equip. Corp. v. City of Akron*, 742

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[21] The New York State Legislature passed legislation specifically authorizing Smithtown to adopt ordinances

> imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing and disposing of solid waste or the recovery by any means of any material or energy product or resource therefrom, including local laws requiring that all solid waste generated, originated or brought within its boundaries, subject to such exceptions as may be determined to be in the public interest, shall be delivered to a specified solid waste management-resource recovery facility....

N.Y.GEN.MUN.LAW § 120-bb(4) (McKinney Supp.1994). The same statute specifically authorizes the Municipal Agreement between Huntington and Smithtown. Id. § 120-bb(1)-(3), (5)-(7). The Legislature specifically approved the cooperative venture between Smithtown and Huntington in legislative findings in 1989 N.Y.Laws 80. The Legislature found that

F.2d 949, 956 (6th Cir.1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 160 (1985) (applying *City of Lafayette* to find antitrust immunity for municipal solid waste services monopoly created pursuant to "clearly articulated and affirmatively expressed policy"); *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir.1983), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985) (same); *Seay Bros. v. Albuquerque*, 601 F.Supp. 1518 (D.N.M. 1985) (finding antitrust immunity for city that implemented and supervised operation of refuse disposal monopoly); *Savage v. Waste Management, Inc.*, 623 F.Supp. 1505 (D.S.C.1985) (finding antitrust immunity for county that gave exclusive franchise for

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> the proper management of solid waste is æoften most economically and efficiently achieved by the cooperative regional development by municipalities of facilities designed to address their mutual disposal needs and that it is in the public interest to encourage such cooperation and that such cooperative development is consistent with the state's solid waste management policy.
>
> The legislature further finds and declares that the towns of Huntington and Smithtown have demonstrated the value of such cooperation and have moved forward to reduce, reuse and recycle solid waste pursuant to the statutory hierarchy established under the Solid Waste Management Act of 1988.

Smithtown's project also met with the approval of the state bonding authority, which lent funds to construct the incinerator. Any lingering doubt as to whether the State of New York approves of Smithtown's activities should be put to rest by the state's filing of an amicus brief in this case supporting Smithtown.

garbage collection and disposal); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F.Supp. 451 (D.Me.1992) (upholding municipal flow control ordinance against antitrust claims). But see *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 378, 111 S.Ct. 1344, 1353, 113 L.Ed.2d 382 (1991) ("We reiterate that, with the possible market participant exception, any action that qualifies as state action is 'ipso facto ... exempt from operation of the antitrust laws.' " (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580, 104 S.Ct. 1989, 2001, 80 L.Ed.2d 590 (1984))); *Jefferson County Pharmaceutical Ass'n v. Abbott Lab.*, 460 U.S. 150, 154, 103 S.Ct. 1011, 1015, 74 L.Ed.2d 882 (1983) (holding that states are subject to Robinson-Patman Act if they compete in the private retail market).

Second, and more important, it is unclear why this court should use the antitrust statutes -- which are subject to legislative change -- to guide our interpretation of the word "regulation" as defined in the Constitution. It is axiomatic that we prefer constructions of ordinances and statutes that do not conflict with the Constitution. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("[W]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). SSC would have us engage in a sort of reverse-Ashwander analysis and construe Smithtown's activity as violating the Commerce Clause rather than the antitrust laws. We decline the invitation to stand *Ashwander* on its head, and we adhere to our interpretation of the Commerce Clause.

III. CONCLUSION

To summarize:

1. Smithtown's flow control ordinance, which is enforceable through criminal penalties, constitutes

market regulation rather than market participation. The ordinance is indistinguishable from the one struck down by the Supreme Court in Carbone, and thus violates the dormant Commerce Clause.

2. The improvement contract constitutes municipal participation in both the waste collection and disposal markets, and thus does not violate the Commerce Clause.

The judgment is accordingly affirmed in part and reversed in part.

APPENDIX B

DISTRICT COURT JUDGMENT AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SSC CORP.

Plaintiff,

-against-

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Defendants.

Civ. Act. No. 94 Civ. 1992 (TCP)

JUDGMENT AND ORDER

This matter having come before the Court on the cross-motions of the parties for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which motions were returnable on October 28, 1994, before Honorable Chief Judge Thomas C. Platt; and David L. Snyder, Esq. and Leon Friedman, Esq. having appeared for the plaintiff; and Michael Cahill, Esq. and James Joyce, Esq. having appeared for the defendants; and having considered the pleadings, motion papers and answers of the parties with respect to said motions, including all exhibits and a Joint Statement of Stipulated Facts dated August 1, 1994;

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED in its entirety; and defendants motion for summary judgment is DENIED in its entirety.

IT IS FURTHER ORDERED and ADJUDGED that those section of the Smithtown Town Code, including Sections 177-83.D(1) and 177-68 thereof, which operate to prohibit the movement of solid waste in interstate commerce, are violative of the dormant Commerce Clause of the United States Constitution and are therefore null, void and unenforceable.

IT IS FURTHER ORDERED and ADJUDGED that Sections 1.04(A).1 and 1.04(B).2 of the Residential Refuse Collection Contracts (the "Contracts") dated on or about December 19, 1991 between the Town of Smithtown and SSC Corp., are violative of the dormant Commerce Clause of the United States Constitution and are therefore null, void and unenforceable.

IT IS FURTHER ORDERED and ADJUDGED that the prior Stipulation and Order of this Court, filed on May 11, 1994, is VACATED, and defendants are directed to forthwith release to plaintiff the $150,000.00 security retainage authorized by said Order, including any accumulated interest.

IT IS FURTHER ORDERED and ADJUDGED that defendants' counterclaims based on alleged violations of those portions of the Smithtown Town Code and the Contracts which have by this ORDER been declared null, void and unenforceable, are DISMISSED.

IT IS FURTHER ORDERED and ADJUDGED that the remaining claims of the plaintiff are DISMISSED.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction over this matter to the extent necessary to give affect to the terms and conditions of this ORDER and JUDGMENT.

Dated: Uniondale, New York
November 16, 1994

/s/ Thomas C. Platt
Hon. Thomas C. Platt
United States District Judge

APPENDIX C

TRANSCRIPT OF PROCEEDINGS
OCTOBER 28, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SSC CORP.

Plaintiff,

-against-

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN, and PATRICK VECCHIO, Supervisor, TOWN OF SMITHTOWN,

Defendants.

Civ. Act No.
94 Civ. 1992 (TCP)

TRANSCRIPT OF MOTION
October 28, 1994

11:00 o'clock a.m.

BEFORE: HONORABLE THOMAS C. PLATT,
Chief United States District Judge

APPEARANCES:

For the Plaintiff:

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COURTROOM DEPUTY: SSC Corp. Versus Town of Smithtown.

THE COURT: Gentleman, I'm a chicken. Either that or I am Judge Knapp, whose famous comment was "why should you be concerned what I say since this case is going to the Court of Appeals anyway?" Why don't I say I have accepted your stipulated facts. I am convinced I my own mind that the *Carbone* case controls. You submit a judgment, and you take it up to the real power here, where you are going anyway, and leave it at that. I don't see any valid distinction between this situation. It is really not for me to determine that. If you are going to try jurisdiction, you would have to persuade the Court of Appeals or the Supreme Court on that. It would save a lot of time and a lot of effort. I read it. When I first read it, I figured this was dispositive. When I looked it over again in the last 24 hours, I think it is dispositive, and that is it.

MR. FRIEDMAN: That is fine with me.

THE COURT: I am sure that it is fine with you. To deny the defendants' motion and grant your motion. You got the stipulated facts, it's a question of law. You take it up.

MR. CAHILL: Is that the Court's feeling on the contract issue as well?

THE COURT: Yes, it is. That is my decision. Let's not waste anymore time. If you want to, submit a judgment.

MR. FRIEDMAN: Fine, Your Honor.

THE COURT: Denying the defendants' motion and granting yours, and incorporating the stipulated facts on the basis of the *Carbone* case. I don't know how you can get much clearer than that.

MR. CAHILL: Our position is that this was an exception to that.

THE COURT: I don't think so. Good-bye.

MR. FRIEDMAN: Thank you, Your Honor.

MR. SNYDER: Thank you, Your Honor.

MR. CAHILL: Thank you, Your Honor

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